

ENTERED

August 28, 2020

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION****FRANCISCO FLORES****Petitioner****VS.****UNITED STATES OF AMERICA**§
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§**CIVIL ACTION NO. 5:20-CV-135****CRIM. ACTION NO. 5:18-CR-215-1****MEMORANDUM & ORDER**

Before the Court is Petitioner Francisco Flores's motion to vacate his conviction due to ineffective assistance of counsel (Dkt. 1; Cr. Dkt. 141).¹ The motion (Dkt. 1; Cr. Dkt. 141) alleges that Petitioner's attorney in his criminal case, David Almaraz, failed to file a notice of appeal on his behalf. (*Id.* at 2.) In an Order (Dkt. 2; Cr. Dkt. 154) entered August 19, 2020, the Court noted that a notice of non-appeal had been filed and signed by Petitioner and Attorney Almaraz on September 3, 2019. (*See* Cr. Dkt. 133.) However, out of an "abundance of caution," the Court ordered Attorney Almaraz to respond to these allegations. (Dkt. 2; Cr. Dkt. 154.) *See Gomez-Guzman v. United States*, No. 5:09-CR-2528, 2014 WL 12719244, at *5 (S.D. Tex. Mar. 12, 2014) (ordering response by the defendant's attorney regarding defendant's claim that his attorney failed to file a notice of appeal despite a signed notice of non-appeal). Attorney Almaraz filed his response (Dkt. 5; Cr. Dkt. 157) on August 27, 2020, which states that he was "never instructed to file for an appeal." (*Id.* at 4.) For the reasons stated below, Petitioner's § 2255 motion (Dkt. 1; Cr. Dkt. 141) should be denied.

A federal prisoner may move to vacate, set aside or correct his sentence if: (1) the sentence was imposed in violation of the Constitution or the laws of the United States; (2) the

¹ "Dkt." indicates a citation to Civil Action No. 5:20-CV-00135. "Cr. Dkt." indicates a citation to Criminal Action No. 5:18-CR-00215.

district court was without jurisdiction to impose the sentence; (3) the sentence imposed was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). Collateral relief is limited to “transgressions of constitutional rights and . . . a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.” *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992) (per curiam). The Sixth Amendment guarantees the effective assistance of counsel at all critical stages of a criminal proceeding, including plea-bargaining. *Lafler v. Cooper*, 566 U.S. 156, 162, 165 (2012). Moreover, an ineffective-assistance claim may be raised for the first time in a Section 2255 collateral proceeding. *Massaro v. United States*, 538 U.S. 500, 504 (2003). To prevail, the petitioner must show that (1) his “counsel’s performance was deficient,” and (2) the “deficient performance prejudiced him.” *Andrus v. Texas*, 140 S.Ct. 1875, 1881 (2020).

However, a defendant who “explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently.” *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (emphasis in original). Thus, a defendant cannot claim ineffective assistance of counsel based on his attorney’s failure to appeal when the “record reveals that [the defendant] filed a notice of non-appeal, which expressly reflects [his] decision to forgo a direct appeal, and confirms that he made that decision after discussing the matter with his attorney.” *Urbina-Espinoza v. United States*, 2006 WL 2981189, at *1 (S.D. Tex. Oct. 12, 2006).

Here, the record reveals that Petitioner filed a notice of non-appeal that expressly reflects his decision to forgo an appeal and confirms that he made that decision after consultation with his lawyer. (See Cr. Dkt. 133.) The notice states in English and Spanish: “I am a defendant in this

case, and I have now been sentenced. I know that I have the right to appeal to the Court of Appeals. I have discussed my case with my attorney and I have decided not to pursue an appeal.” (*Id.*) Petitioner and his lawyer (Attorney Almaraz) both signed the notice, which is dated September 3, 2019—the date of Petitioner’s sentencing. (*Id.*) Thus, the record plainly discredits Petitioner’s claim that he told his lawyer to file an appeal “on his behalf at [the] sentencing stage of the proceeding.” (Dkt. 1 at 2; Cr. Dkt. 141 at 2.) With Attorney Almaraz’s confirmation of these facts (*see* Dkt. 5; Cr. Dkt. 157), the Court finds that Petitioner has failed to establish deficient performance by his attorney. His claim must therefore be dismissed.

For the foregoing reasons, Petitioner’s § 2255 motion to vacate for ineffective assistance of counsel (Dkt. 1; Cr. Dkt. 141) is hereby DENIED. Civil Action No. 5:20-CV-135 is hereby DISMISSED WITH PREJUDICE. Because the Court finds that Petitioner makes no substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2). The Court certifies that any appeal from this decision would not be taken in good faith and therefore should not be taken *in forma pauperis*. *See* 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3).

The Clerk of court is DIRECTED to mail Petitioner a copy of this Order by any receipted means at the address indicated in his most recent filing. The Clerk is further DIRECTED to TERMINATE Civil Action No. 5:20-CV-135.

IT IS SO ORDERED.

SIGNED this 28th day of August, 2020.



Diana Saldaña
United States District Judge